United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANTS AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,941

SAMUEL ZOLA, M.D.
and
GLORIA ZOLA,

Appellants,

v.

HARLAN V. HADLEY
and
ANN OBENCHAIN HADLEY,

Appellees.

Appeal From The United States District Court
For The District of Columbia

FRIEDLANDER & FRIEDLANDER

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STATEMENT OF QUESTIONS PRESENTED

1. Where the trial court failed to set any standards for noise which might emanate from a condenser, is an injunction against the use of said condenser because of noise level, error?

2. Was it error for the trial court to find that an air-conditioning condenser, installed in the yard of Appellants' home, emanated an inordinate amount of moisture, where the evidence fails to show that that was the condition at the time the suit was filed or at the time of the trial?

3. Where the condensers installed on the property of the Appellants were not naturally productive of material discomfort to persons of ordinary susceptibility, tastes and habits, is it error for the trial court to require the moving of said units to another location in order to accommodate the tastes and habits of the Appellees, without setting standards and measures to guide Appellants in the relocation of the condensers?

4. Was it error for the trial court to make his finding not supported by substantial evidence?

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For The District of Columbia

BRIEF FOR APPELLANTS

JURISDICTIONAL STATEMENT

Appellees brought suit in the United States District Court for the District of Columbia, seeking to enjoin the use of airconditioning condensers in the back yard of the Appellants, charging that said condensers created a noise level high enough to become a nuisance to the Appellees or guests of the Appellees. They further charged that the condensers created a visible condensation into the air which made a

portion of the patio of the Appellees unfit to be used; and they also charged that a certain portion of the woodwork of the garage belonging to the Appellees had been damaged by the said condensation.

The Appellants answered, denying that the equipment installed by the Washington Gas Light Company in a recommended location, caused any spray, as alleged, denied that there was a noise level high enough to become a nuisance, and denied that the damage to the garage was caused by any moisture from their equipment.

The case came on to be tried on these issues, and the court excluded any consideration of the damage to the garage, but held that the units emanated an inordinate amount of moisture and noise, and ordered the Appellants to remove their condensers from their present location, and not to install them anywhere which would continue the nuisance complained of by the Appellees.

A supersedeas was filed by the Appellants, and this appeal was taken.

This Court has jurisdiction of the appeal under Title 28 of the United States Code, Section 1291.

ASSIGNMENT OF ERRORS

1. The court erred in holding that an inordinate amount of noise and moisture emanated from the condensers.

2. The court erred in not applying any standards of noise or moisture, and in not requiring proof of any standards of noise and moisture.

3. The court erred in failing to apply the law of this jurisdiction, which requires noise or moisture to be of such standards as would affect persons of ordinary susceptibilities, tastes and habits, rather than persons who might be nervously sensitive or have dainty modes and habits of living.

STATEMENT OF FACTS

The Appellants, Dr. Samuel Zola and his wife, have resided at 2810 - 31st Street, N. W., in the District of Columbia, for approximately seventeen years (J.A. 31). The Zola property is an irregular, triangle-shaped lot, bounded in the rear by a high cedar, split-picket fence, the back wall of the next-door garage, and by a high stone retaining wall.

Abutting the Appellants' property to the rear is the property of Appellees, Harlan V. Hadley and his wife. The Hadleys have resided in their premises for approximately six years (J.A. 5). The Hadley house faces or fronts on Cleveland Avenue (3107 Cleveland Ave., N. W.), a noisy thoroughfare (J.A. 7). The Hadleys' house is airconditioned and is serviced by its own condensers which the Hadleys located within five or six feet of another neighbor's property. Abutting both Appellants' property and Appellees' property is the residence of Eugene Bogan (J.A. 11). The Bogans' house is airconditioned and is likewise serviced by outdoor condensers located in their back yard. The Bogan units are identical to the Appellants' units, except that they are older and noisier (J.A. 13).

In the fall of 1962 (J.A. 2) the Appellants, in the process of remodeling their house, caused their premises to be likewise airconditioned. In connection with the airconditioning, two condensers were erected in the Zolas' back yard at a location abutting the brick wall of the Hadleys' garage. This brick wall constituted part of the boundary between the two properties. The installation was upon the advice of an architect and an airconditioning engineer (J.A. 31), and the units were installed by the Washington Gas Light Company. There was nothing defective about the installation or the operation of the units. These units were airconditioning, water-cooling towers, square boxlike structures, two and one-half feet long, three feet wide and

five feet high. The operation inside the units which produced a noise was a centrifugal type fan which blew the air through the cooling towers (J.A. 24).

On mornings when the air was cool and humid, the towers would generate and emit a water vapor. This occurred on limited occasions and was a normal emission from such equipment (J.A. 25). When the towers operated (the operation of the centrifugal-type fans) a whirring or humming type noise* emanated from them (J.A. 17). This was the normal operating sound of such units (J.A. 12 & 24).

In the spring of 1963 the Appellants began their use of the airconditioning for their home (J.A. 5). The Hadleys complained in June of the moisture and the noise emanating from the units. In response to the complaints the Washington Gas Light Company was contacted and had hoods installed on the tops of the two towers, causing the discharge of air and moisture to be directed towards the Zola house and away from the Appellees. The change in direction of the water vapor was successful. This was done in August of 1963 (J.A. 24). Thereafter the Hadleys continued to complain, and demanded that the towers be moved from their original location where the noise competed with the dripping sound of the Hadleys' small fountain which was installed on the Hadleys' garage wall (J.A. 15).

On February 18, 1964 Appellees filed their complaint to enjoin a nuisance, and the cause came on for hearing before Judge Alexander Holtzoff on June 29 and 30, 1964. No tests were made on behalf of the Hadleys, nor was any expert testimony offered at the trial as to the noise content, nor as to any other measures of the sound (J.A. 10). The only evidence of a standardized measure for noise emanating from airconditioning equipment was offered by the Appellants (Dfts.

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* Also described by Appellee, Harlan V. Hadley, as sounding like a washing machine (J.A. 8).

Exhibit 3 for identification; J.A. 22), but was not allowed into evidence by the court. The court rendered an oral opinion that the units emanated an inordinate amount of moisture and noise (J.A. 35); and on July 1, 1964 entered an order that Appellants remove their airconditioning condensers from their present location, and not to install them anywhere which would continue the nuisance complained of by the Appellees. On July 10, 1964 Appellants duly filed their notice of appeal.

SUMMARY OF ARGUMENT

The noise and moisture complained of by the Appellees was never shown to be above any standard and, absent prcof of an excessive noise, no injunction was proper. Absence of proof of excessive moisture at the time the suit was filed and at the time the trial took place, rendered the finding of the court improper. The standards fixed by this Court require that a nuisance created by a noise be such as would produce — in the judgment of reasonable men — physical discomfort to persons of ordinary sensibilities and of ordinary tastes and habits and, in view of the circumstances of the case, is unreasonable and in derogation of the rights of the complaining party. Such law was not applied in the instant case.

It was unfortunate that the court had had a personal experience when he was living in a building, and knew of airconditioning apparatus which caused a lot of disagreeable noise to neighbors (J.A. 11).

The court also felt that he could consider the inadvisability of having apparatuses which work with water rather than airconditioning units which had no water in them (J.A. 25).

ARGUMENT

I.

The Court Failed To Require Proof or To Set Standards for Noise and Moisture Nuisance

Appellants, while remodeling their house in the fall of 1962, installed an airconditioning system which was apparently very similar to the airconditioning systems of their neighbors, the Bogans and the Hadleys. The airconditioning system was installed upon the advice of an architect and an airconditioning engineer and, because of the large size of the Appellants' house, was a water-cooled system.

Part of the mechanism of the water-cooled system were two outside water towers or condensers consisting of square box-like structures. five feet tall, three feet wide and two and one-half feet deep. Inside of these structures were centrifugal-type fans which blew air over coils to remove the heat from the circulating water. When these machines operated in their normal fashion they produced a whirring or purring sound, as the fans rotated and, under certain atmospheric conditions, produced a condensation of moisture.

The evidence indicated that there was nothing abnormal about the operation of the apparatus, but the trial court not only did not require the Appellees to put into evidence some standard or measure of a noise which would be normal and of a noise which would be excessive, or of a moisture discharge that would be normal or excessive, but actually refused to permit the Appellants to offer evidence of some standard with regard to airconditioning water coolers. Instead, the court in reaching the conclusion that the noise and moisture were of an inordinate amount, relied upon the complaints of the Appellees and their witnesses and the court's own experience with some disagreeable sounding airconditioning apparatus in a building where he had lived.

Obviously, moisture per se is not a nuisance any more than smoke from a chimney or from a fire place, exhaust fumes from an automobile, or fumes from a power lawn mower, unless it arrives at some point of excess. Likewise, the sound of a whirring fan, or even of a washing machine, is not per se a nuisance, unless it is excessive; and, although the court recognized no measure or standard, this Court of Appeals in many decisions has laid down a guideline not followed in the instant case.

No clearer statement can be found than that in *Akers v. Marsh*, 19 App. D. C. 28, where the Court stated, at pages 42 and 47:

> "In cases of this character questions of great importance, as well as of great delicacy, are nearly always involved; the question being within what limit or under what restriction a party complaining can rightfully insist that his neighbor shall use or enjoy his property. The maxim is an old one, and one which is founded in the necessity of property rights and the good order of society, which declares that every person must enjoy his own property in such a manner as not to injure that of another person. This, however, is but the formulation of a general principle. A party must enjoy his own property in such manner as not to involve the **legal rights** of his neighbor as defined by law. But, in the relations of communities of people, mere matters of inconvenience or ordinary discomfort, such as are ordinarily incident to social life, must be endured, and cannot be made the subject of judicial cognizance. There are always certain inconveniences and annoyances that must be suffered, and owing to the different temperaments and nervous conditions of people, some suffer more than others. But the law does not make an exception to meet the cases of pronounced idiosyncrasies or states of peculiar infirm health of people. If every instance of annoyance, resulting from noise, smoke or odor, proceeding from a neighbor's premises, or light flickering in or glaring from a neighbor's windows, to the discomfort of a party living nearby, could be made the ground for judicial interference,

without reference to the special circumstances of the case, and the degree of annoyance or discomfort suffered, the courts would be filled with such litigation, and a large portion of the inhabitants, especially of cities, would be constantly engaged in litigious strife. The law, however, does not encourage such litigation. It is only for the invasion of the legal rights of the complainant that the court will interfere; and no right of action either at law or in equity can be supported against a party **for the reasonable use** of his property or the **reasonable exercise of his rights over the same,** although such rights be enjoyed or exercised in a manner that may occasion annoyance or inconvenience to another. The books abound with illustrations of this general principle.

* * * * *

"'A nuisance by noise (supposing malice to be out of the question) is emphatically a question of degree. If my neighbor builds a house against a party wall, next to my own, and I hear through the wall more than is agreeable to me of the sounds from his nursery or his music room, it does not follow (even if I am nervously sensitive or in infirm health) that I can bring an action or obtain an injunction. Such things, to offend against the law, must be done in a manner which, beyond fair controversy, ought to be regarded as exceptional and unreasonable.'"

The measure here in the District of Columbia is whether the nuisance complained of will or does produce such a condition of things as in the judgment of reasonable men is naturally productive of physical discomfort to persons of ordinary sensibilities and of ordinary tastes and habits and as, in view of the circumstances of the case, is unreasonable and in derogation of the rights of the complainant.– *French v. The Association for Works of Mercy,* 39 App. D. C. 406; and *Heylman v. District of Columbia,* 27 App. D. C. 563.

There is no evidence as to how often the Appellants' condensers operated, or whether the fans therein actually ran all the time or

part of the time; and there is no evidence as to the volume or intensity of the noise, or to what extent the volume or intensity would be decreased or changed by the movement of the units any prescribed distance in the yard, except that there was evidence that if the units were moved over near the retaining wall, the noise would be increased because the wall would act as a sounding board. There is no evidence that the actual operation of the units were productive of physical discomfort to persons of ordinary sensibilities, since there was a total absence of evidence by the Appellees as to what effect the operation of their own airconditioning equipment had on their sensibilities. A mutual neighbor, Eugene Bogan, testified that he himself had identical equipment, although a little older and a little noisier, and that this did not bother him or his family because he had surrounded the same with bushes. The testimony of the appellant Samuel Zola was that he and his guests sat in the back yard near and next to the machinery, and that it did not bother them.

The only evidence the court had available to base its findings upon was that testimony of Mr. Hadley (Appellee) who did not like the noise or the sight of a column of vapor or mist and a feeling of humidity. Appellees also had the testimony of a family friend, a Marcine Steele, who testified that when she sat in the patio in a chair by the fence separating the two yards, the operation interfered with her conversation and competed with the sound of the dripping of the small fountain the Appellees had on their garage wall. There was a total absence of testimony as to whether the sounds of the Zola airconditioning equipment was in harmony with or discordant with the tunes played by Appellees' airconditioner or that of the neighbors, the Bogans, or whether the noise was more than or less than the noisy traffic on Cleveland Avenue.

The trial court said:

> "I want to say this: I have known of airconditioning apparatus that caused a lot of disagreeable noise to neighbors. I was living in a building where I was confronted with that situation at one time. So those things are real. They are not imaginary."

The mere fact that the equipment of the Appellants (said Appellants were making a reasonable use of their property in a neighborhood where all the parties have similar equipment) may on occasion annoy or inconvenience the Hadleys, does not give a right of action to the Hadleys, either at law or in equity, and the court below was in error in issuing its injunction.

It should be further observed that the injunction itself required the Zolas to move the location of the airconditioning condensers and not to reinstall them at any location which would continue the nuisance complained of. This left and leaves no measure by which the Appellants could comply, except as to whether or not the Hadleys would complain. This clearly is not in keeping with the above cited authorities.

As to the moisture which the court found to be a nuisance, the evidence clearly showed that such nuisance, if any, had been abated in August of 1963 by the installation of hoods which threw the moisture back onto the Zola property. If the flow of water vapor onto a neighbor's property is in fact an actionable nuisance, it would seem that the abating of the nuisance would remove the cause of action; and if it was abated – as it was in this case – by the installation of hoods, upon what basis and what evidence did the court rule that the Appellants should move their equipment because of said nuisance? Argument on this point is difficult because the court's findings were so incredible.

The court seemed to have an idea that the Zolas used bad judgment in installing a water-cooling system instead of an air-cooling system.

II.

There Was No Substantial Evidence To Support the Court's Findings

The court found that:

> " . . . The testimony establishes both an inordinate amount of noise and an inordinate amount of moisture emanating from the apparatus in the direction of the plaintiffs' property." — Oral Opinion of the Court; J.A. 35

In support of this finding the court had before it the testimony of the Appellee, Harlan Hadley, who testified:

> "Well, there was a noise, and there was the sight of a column of vapor, or steam, or fog or mist, and there was a feeling of excess humidity in the air."
>
> * * *
>
> "There is a machine running right against our property line which makes conversation difficult next to the machine, which spews moisture in finite form on guests who happen to be in the corner next to the machine."
>
> * * *
>
> "It is a noise like a washing machine." (J.A. 6 & 8)

No tests were made by any experts as to noise content, or as to the amount of moisture coming from the machines or onto the Appellees' property (J.A. 10). This is the extent of Appellees' direct testimony about the noise and moisture throwing of the machines.

On behalf of Appellees, a neighbor, Mr. Eugene F. Bogan, testified. He stated that he was familiar with the noise level and the moisture effect of the Appellants' machines, and described the machines as being like the ones on his own property (J.A. 12), and that the Zolas' machines:

> "Both last summer and again a week or so ago the machines produced a large, a noise — I don't know what you would call it — I would call it a very loud hum."

It interfered with his conversation. There was no testimony about where his conversation took place. He observed, however, that the Zolas' machines were not as noisy as his own, but that his were surrounded by a high growth of evergreens and high bushes, and therefore did not present a problem. He said that he could hear the hum of the Zolas' machines on his own patio thirty-five to forty feet away, but that it was not loud enough to be a nuisance (J.A. 14), and he did not know whether the moving of the Zolas' machines some ten or eight feet would have any effect.

There was also testimony by Marcine Steele, a frequent guest of the Hadleys. She did not visit with the Hadleys in the summer of 1964, and her testimony was solely about the summer of 1963 (J.A. 15). She testified that the noise was in competition with the fountain and that she had seen the moisture — "particularly early in the morning when I have stopped by." She described the machines as having a humming sound (J.A. 17).

In addition, the Appellees had claimed that the moisture from the machines had killed their roses, which they had to replace, and had caused the paint to peel on their garage, which garage they had not had painted since 1959. The court did not give this any real consideration or award any damages.

Thus, the sole basis for the court's findings relates to the above described testimony on behalf of the Appellees.

The Appellees' witness, Mr. Lester M. Harmon, Manager of J. H. Small & Sons Nurseries, had been to the Appellees' patio to look at the roses, and had heard the airconditioning unit operate but had not noticed any noise (J.A. 20), although he had observed the moisture from the machines going up into the air.

The court himself observed that he had an airconditioning unit in his bedroom and another in his living room, and that he did not have any water in his units (J.A. 5), although the expert — John C. Judge — a supervising engineer for airconditioning installations for the Washington Gas Light Company, testified that large installations are generally water-cooled and that the Zola house was a large house (J.A. 26); that the noise level of the units was not objectionable; and that the installation of the hoods on the units in August of 1963 was successful in discharging the moisture entirely within the Zolas' yard (J.A. 24). This man was Appellants' witness and, although he acknowledged that if the machines were moved and surrounded by bushes — "It would possibly make it quieter" — he further stated that this would change the direction of the exhaling of moisture toward the Hadleys' property instead of away from it, and that the relocation to some areas might make the sound greater instead of diminished (J.A. 28 & 29).

With only this evidence to go on before it, the court had no substantial evidence upon which to base the findings that the moisture and noise were excessive. Clearly, the court did not apply the standards set down by the Court of Appeals. In viewing the evidence the court did not consider whether the units produced such a condition of things as in the judgment of reasonable men was naturally productive of physical discomfort to persons of ordinary sensibilities and ordinary habits in such a way as to be in derogation of the rights the complainants, nor did the court consider whether the Zolas had made a reasonable use of their property without inflicting substantial injury upon their neighbors; but instead the court declared that the only point in the case was whether the units had to be so close to the Hadley property and whether, if they were moved twenty or thirty feet and were surrounded with bushes — "the way Mr. Bogan did his, that most of these troubles would be cured."

The court's judgment based upon its findings was that the Appellants be directed to "remove the said airconditioning condensers from the present location and not to install them at any location which will continue the nuisance complained of herein."

Clearly the enforcement of this order rests entirely in the sensitivities of the Hadleys. Since there was no evidence upon which to base the original judgment, there is likewise no measure upon which the Appellants could rely to determine whether or not they had complied with the order except to get their neighbors' nod. This is not in keeping with the law of this jurisdiction.

What havoc such a criterion could raise among the warring denizens of an air-cooled neighborhood!

CONCLUSION

It is respectfully submitted that the decision of the trial court was wrong and should be reversed.

Respectfully submitted,

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JOINT APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HARLAN V. HADLEY
3107 Cleveland Avenue, N.W.
Washington, D.C.

and

ANN OBENCHAIN HADLEY
3107 Cleveland Avenue, N.W.
Washington, D.C.

Plaintiffs

vs.

SAMUEL ZOLA, M.D.
2810 - 31st Street, N.W.
Washington, D.C.

and

GLORIA ZOLA
2810 - 31st Street, N.W.
Washington, D.C.

Defendants

} Civil Action No. 418-64

[Filed, February 18, 1964]

COMPLAINT TO ENJOIN NUISANCE AND FOR OTHER AND APPROPRIATE RELIEF

The plaintiffs respectfully state to the Court as follows:

1. That the jurisdiction is conferred on this Court by Title 11, Sections 305, 306, D.C. Code (1961 ed.).

2. That the subject matter of this suit, certain buildings on certain land, is in the District of Columbia.

3. That the plaintiffs, Harlan V. Hadley and Ann Obenchain Hadley, are citizens of the United States and residents of the District of Columbia, and are the record owners of premises located at 3017 Cleveland Avenue, N.W., in the District of Columbia, where they dwell more particularly described as Lot 19 in Square 2121, recorded in the Land Records for the District of Columbia.

4. That the defendants, Samuel Zola and Gloria Zola, are record owners of premises located at 2810 - 31st Street, N.W., in the District of Columbia, which real property abutts on the real property owned by plaintiffs herein.

5. That during the fall months of 1962 the defendants did have installed certain air-conditioning condensers immediately adjacent to the property owned by the plaintiffs. The property owned by plaintiffs and the property owned by defendants is separated by a split cedar fence, and on the property owned by plaintiffs immediately adjacent to said fence, the plaintiffs have built and use a patio during the warm weather. The air-conditioning condensers when operating create a noise level which is high enough to become a nuisance to the plaintiffs or guests of the plaintiffs while seated on said patio. In addition, the said air-conditioning condensers create a visible and condensation into the air. Much of the condensation settles on the patio owned by plaintiffs and makes a certain portion of said patio unfit to be used. In addition, the said condensation has caused rotting to set in on a certain portion of the wood-work of the garage belonging to the plaintiffs, which is located immediately adjacent to where the said condensation comes on to the property of the plaintiffs.

6. That a grave injury is threatened and is impending to the rights of the plaintiffs who assert that they sustain irreparable damage in the circumstances which obtain; that the defendants have a large yard and numerous other places where the said air-conditioning condensers could be located and would cause inconvenience or damage to no one.

WHEREFORE, the premises considered, the plaintiffs pray:

1. That process issue out of this Court directed to the defendants herein, requiring them to answer the exigencies of this Complaint.

2. That the defendants by order of this Court be enjoined, pendente lite and permanently, from operating the above described air-conditioning condensers while located in their present condition.

3. That the defendants be required to remove the said air-conditioning condensers from their present location and not to install

them at any location which will continue the nuisance complained of herein.

4. That the Court grant such other and further relief which may be deemed just and proper.

/s/ Harlan V. Hadley
/s/ Ann Obenchain Hadley

DISTRICT OF COLUMBIA, SS:

HARLAN V. HADLEY and ANN OBENCHAIN HADLEY, being first duly sworn on oath depose and state that they have read the foregoing complaint by them subscribed and know the contents thereof; that the matters and things stated therein of their own personal knowledge they know to be true, and those matters and things stated on information and belief, they believe to be true.

/s/ Harlan V. Hadley
/s/ Ann Obenchain Hadley

SUBSCRIBED and sworn to before me this 13th day of February, 1964.

/s/ James C. Toomey
Attorney for Plaintiffs
910 - 17th Street, N.W.
Washington 6, D.C.

[Filed March 25, 1964]

ANSWER TO COMPLAINT

First Defense

The complaint fails to state a cause of action upon which any relief can be granted.

Second Defense

The Defendants and the Plaintiffs are adjoining property owners in the City of Washington, District of Columbia. The Defendants, following the recommendations of the Washington Gas Light Company, installed evaporative coolers in the rear yard on the property of the Defendants. An architect suggested the present location of said cool-

ers. Said location was acceptable to the Defendants and was in accordance with the provisions of the laws of the District of Columbia. The location was also approved by the Washington Gas Light Company.

Your Defendants deny that there is any spray from the coolers, as alleged in the complaint. Defendants further deny that there is any noise level high enough to become a nuisance to the Plaintiffs or their guests.

A sheet metal deflector was installed on the coolers to create a more positive throw of air into the Defendants' back yard, and these deflectors eliminate any remote possibility of any spray deteriorating the fence of the Plaintiffs or causing any distrubance to the Plaintiffs.

The allegations of the complaint are otherwise denied the same as if each allegation was specifically denied.

/s/ Samuel Zola, M.D., Defendant

DISTRICT OF COLUMBIA, SS:

Samuel Zola, being first duly sworn, on oath deposes and says he is a Defendant in the above entitled cause; that he has read the foregoing answer by him subscribed and knows the contents thereof; that those matters and things therein stated as facts, are true, and those set forth upon information and belief, he believes to be true.

/s/ Samuel Zola, M.D.

Subscribed and sworn to before me this day of March, 1964.

/s/
Notary Public, D.C.

[Certificate of Service, March , 1964]

[Filed, September 23, 1964]

EXCERPTS FROM PROCEEDINGS

3 MR. FRIEDLANDER: * * *

I think the issue in this case is whether or not a noise is created which is high enough or loud enough to become a nuisance.

*****

5 HARLAN V. HADLEY

one of the plaintiffs, called as a witness in his own behalf, being first 6 sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. TOOMEY:

Q. Would you state your full name, sir? A. I am Harlan V. Hadley.

Q. Where do you live? A. 3107 Cleveland Avenue, Northwest, Washington, D.C.

*****

Q. Mr. Hadley, for how long have you lived in this premises? A. Since the fall of 1958.

Q. Directing your attention to the backyard of your premises, would you briefly describe to the Court what is built there? A. Yes, sir. Between my house and the garage and the fence which forms a boundary, we have a stone patio.

*****

7 Q. Now, what type of fence is this? A. It is a split-picket fence, cedar fence.

*****

Q. Who owns the property directly across your picket fence? A. Dr. Zola.

*****

9 Q. And what type of machinery was that?

*****

10 A. I believe it is called an evaporative cooler.

Q. Did there come a time when this machinery commenced in operation, to your notice? * * *

A. That was sometime in the spring of 1963.

Q. Would you briefly describe to the Court what effect it had on your property, or the use of your property? * * *

A. Well, there was a noise, and there was the sight of a column of vapor or steam or fog or mist, and there was a feeling of excess humidity in the air.

*****

12 Q. Now, Mr. Hadley, since your occupancy of the premises in 1958, have you used during the spring, summer and fall months your patio area for entertainment purposes? A. Yes, sir; extensively in 13 the early years of my occupancy.

Q. And have you recently used it for entertainment purposes?

A. Very rarely.

Q. And what is the cause that you seldom use it? * * *

A. There is a machine running right against our property line which makes conversation difficult next to the machine, which spews moisture in finite form on guests who happen to be in the corner next to the machine.

Q. Have you noted any damage done to any of your property as a result of this moisture? A. Yes, sir.

Q. Would you briefly describe what? A. There is damage done to the woodwork on the garage in the corner next to the machine. We have had extensive damage to our plantings, mainly roses.

Q. When you say extensive damage to your roses, and plantings, what has happened? Are the roses still there? Are they dead, or 14 what? A. The roses have had to be replaced.

*****

16 Q. Now, Mr. Hadley, have you attempted in any other way to eradicate this condition that exists, other than what you have described by attempting to contact your neighbor? A. Well, I have tried to offset the damage done to the roses by replanting roses.

*****

THE COURT: But just what happened to the roses?

THE WITNESS: They died.

THE COURT: I see. Then you tried to plant others?

THE WITNESS: Yes, sir.

THE COURT: And what success did you have?

THE WITNESS: Very poor so far.

*****

17 CROSS-EXAMINATION

BY MR. FRIEDLANDER:

*****

Q. What is the condition of traffic on Cleveland Avenue? A. It is fairly heavy traffic.

Q. And noisy? A. Yes, sir.

*****

18 Q. And to your right is there another house on Cleveland Avenue? A. Yes, sir.

Q. And how close is that house to your house? A. Perhaps one hundred feet; perhaps seventy-five.

Q. And to your left, is there another house? A. There is.

Q. And how close is that to your property, or your house? A. Well, the houses, I imagine, are fifty or maybe sixty feet apart.

*****

19 Q. * * *

Now, where is your air-conditiong unit? A. Practically under my dining room window, as close to the wall as they could put it.

Q. What is its relation to the house to your left? How close is it to his garage? A. Well, it's about five feet from my fence, and there's about five feet on the other side of the fence, so I guess it's about ten or twelve feet from his garage.

Q. How close is your outside unit for your air-conditioning to your neighbor's line? A. About five or six feet.

Q. Is it not next to or close to the garage wall of your neighbor? A. There is a fence that separates them.

*****

20 Q. And in order for the machines to operate, they make a noise, you say, is that right? A. Yes, sir.

Q. Now, is it a loud noise? A. What's your definition of loud?

Q. Well, "loud" is like my voice? A. No, it is like my voice.

Q. What? A. Quieter.

THE COURT: Is it a hum?

THE WITNESS: It is a noise like a washing machine, Your Honor. I don't know how better to describe it.

*****

21 Q. Where are these two machines located in relation to the twelve foot of brick wall? Are they in the middle of the two items?

*****

THE WITNESS: Well, Your Honor, they are approximately at either end of my garage wall which faces the Zolas.

*****

THE COURT: This machinery is alongside the wall of your

22 garage?

THE WITNESS: Yes, sir. I would say one end of it is approximately even with the end of the garage.

THE COURT: And the other end? Does it extend along the fence or along the wall of the garage, in other words?

THE WITNESS: Along the wall of the garage.

THE COURT: How close to the wall of the garage is it, Mr. Hadley?

THE WITNESS: I have never measured it, but I imagine within a foot, perhaps.

THE COURT: It doesn't lean up against it? A.

THE WITNESS: No, sir.

THE COURT: There is a very narrow space there?

THE WITNESS: Perhaps twelve inches; maybe fifteen inches.

*****

THE COURT: How big is this machinery?

THE WITNESS: Well, Your Honor, I would say it is probably about five feet high by three and a half wide by two and a half deep. It is rectangular in shape.

THE COURT: It is a sort of metal box, is it?

23 THE WITNESS: Yes, sir.

*****

THE COURT: Mr. Toomey, before we proceed, I would like to make an inquiry: Does the plaintiff claim that this machinery is defective, or that the noise is inherent in the machine and it ought to be removed? Exactly what is the type of relief that you ask for?

MR. TOOMEY: The type of relief that we ask, Your Honor, is simply that the machine—in response to your question as to whether or not the machine is defective, I do not know, but from my conversa-
24 tions with the representatives of the gas company before we filed the suit, I gather that the machine is not defective. Therefore, we must ask that the machine be moved to another location in the yard.

THE COURT: If it is moved to another location in the yard, would that prevent the noise and the moisture from getting into the plaintiffs' patio?

MR. TOOMEY: Yes, very definitely. And the next question would probably be: Would the other neighbor, assuming that it were moved—

THE COURT: That is what I was wondering.

MR. TOOMEY: The other neighbor is present, and he is prepared to testify as to locations where it could be moved where it would not be harmful to his particular situation.

*****

29 BY MR. FRIEDLANDER:

Q. Mr. Hadley, after you wrote some of these letters, you received a call from two gentlemen from the Washington Gas Light Company, did you not? A. Yes, sir.

*****

Q. The people from the Gas Light Company did call on you, did they not? A. Yes, someone came.

Q. And spoke to you and your wife? A. Yes, sir.

30 Q. Would you tell us what the conversation was? A. This was awhile ago. I have nothing with which to refresh my memory except that the conversation was unsatisfactory.

*****

Q. Did they tell you that they were going to put on a cover? A. No, sir.

Q. Did they put on a cover? A. This spring they did.

Q. What was the nature of the cover they put on? A. A piece of
31 sheet metal over the top of the evaporator.

Q. To do what? A. Intended to deflect the moisture and hot air from my patio, I presume.

Q. In what direction did it throw the hot air and moisture, as you call it? A. Opposed to me.

Q. Into the place where Dr. Zola and his wife have their chairs that they sit on? A. Dr. Zola's; yes, sir.

*****

THE COURT: Has that improved the situation?

THE WITNESS: It has improved it but not cured it.

*****

32 BY MR. FRIEDLANDER:

Q. Mr. Hadley, have you had any expert make any tests as to the noise content? A. No, sir.

Q. Have you had any expert make any test of the moisture that comes from the machine? A. No, sir.

Q. When was the last time you saw the machine in operation? A. Probably yesterday.

Q. Now, what was the sound it made yesterday? A. Somewhat noisier than it was a year ago.

Q. And how would you describe that for us? A. The closest analogy I can think of is as a washing machine.

*****

33 Q. Did they tell you that the Washington Gas Light Company machine, operated by gas, had fewer moving parts than any other equipment? A. I have no recollection of that.

Q. Do you recall the conversation? A. I recall a conversation. I recall several conversations.

Q. With the Gas Light people? A. Yes, sir.

Q. How many? A. Two or three.

*****

34 Q. Didn't they describe to you that they were going to install a sheet metal deflector on the coolers to create a more positive flow of the exhausting air into the Zolas' backyard? A. I have no recollection of having been given that information before it happened.

*****

Q. Is it your testimony that that spray has deteriorated your
35 fence? A. I don't believe that we allege that.

*****

THE COURT: How wide is the defendants' yard approximately?

36 MR. FRIEDLANDER: It is forty-five feet.

THE COURT: Well, couldn't the machine be moved into the middle of the yard so as not to affect the neighbors on either side?

*****

38 THE COURT: I want to say this: I have know of air-conditioning apparatus that caused a lot of disagreeable noise to neighbors. I was living in a building where I was confronted with that situation at one time. So those things are real. They are not imaginary.

*****

41 EUGENE F. BOGAN

called as a witness by the plaintiffs, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. TOOMEY:

*****

Q. And where do you live, sir? A. At 3115 Cleveland Avenue, Northwest.

*****

42 Q. Is this property next door to the property of Mr. and Mrs. Hadley? A. It immediately adjoins the Hadley property on the north side of their property. I guess it's probably the west side.

*****

Q. And the back portion of your property, does this abut on the property of Dr. Zola? A. It does, sir. The property runs through from Cleveland Avenue to an alley in the middle of the block, and at one point it passes the Hadley boundary and then runs alongside of the Zola property for perhaps 75, 80 or a 100 feet. I have never measured it.

*****

43 Q. What is your occupation, Mr. Bogan? A. I am a lawyer, sir.

*****

44 Q. You incidentally were the one who took the pictures which previously have been introduced in evidence, were you not? A. I think I took all of them, sir, some time last summer, probably in August.

Q. Now, would you briefly describe—are you familiar with the two machines that are the subject matter of this litigation? A. I have seen them by observing them from our property and also observing them from Mr. Hadley's property.

Q. Briefly would you describe their size? A. I would estimate each machine is perhaps five feet high and perhaps three and a half feet long and perhaps three feet wide. They are what we call, what I call cooling towers. I have a pair of them on my own property next door.

Q. Now have you observed those machines in operation? A. I have last summer and again recently.

Q. Have you observed anything unusual about these machines? By that I mean have you listened to the noise or noise level emanating from these machines? A. I am familiar with the noise level and also the moisture effect of these machines?

Q. What have you observed as regards moisture effect of the machines? A. Well the machines, like the ones on my own property,
45 have rather powerful fans inside of them and the fans blow into the bottom of the machine and come up through the innards of the machine and throw a blast of air into the air perhaps eight or ten feet. The cooling tower is what happens is that hot water comes from the cooling system in the house and is spread on baffle plates in the machine. The purpose of the air blast is to take the heat out of the water and that's done by an air blast through the machines coming out through the top of the machines, the water being cooled by the time it reaches the bottom goes back into the house where the basic cooling plant is and then comes out again as hot water to have the heat removed. In the course of the air blast going through the machines the air picks up a lot of vapor from the water that is being spewed around the baffle plates in the machines.

Q. You have observed, or what have you observed on Mr. and Mrs. Hadley's property which has resulted from the moisture? A. Well last summer I observed the moisture problem of this column of moisture drifting over their patio. I saw the places of bad paint on part of the trim on the garage.

Q. Have you stood or sat on the patio belonging to Mr. and Mrs.

Hadley and experienced the noise level? A. Both last summer and again a week or so ago the machines produced a large, a noise—I don't know what you would call it—I would call it a very loud hum. Its
46 pitch is just enough of a pitch to interfere, in my case, conversation. Whatever the sound engineers call this problem of decibels and pitch and whatnot, there is this type of a noise problem in the machines.

*****

Q. And are yours comparable or similar to the condensers we are discussing here? A. Well my observation—I have never been on the Zola property to examine their machines closely—I have just done it from observing across their wall—their machines appear to be pretty much the same as we have except I think they are a later model. Ours, I think, is perhaps five or six years old, but the physical contour and the blast of moisture laden air coming out of the top and the sound is pretty comparable to our own.

THE COURT: Well, does yours make the same amount of noise as these?

THE WITNESS: Ours perhaps being an older model are, I think, a little noisier, Your Honor, but we have them buried in a high grove of evergreens and high bushes so you can't even see them. This
47 dampens the noise a lot and also picks up a lot of the water vapor, and we have little plants around them that the water vapor wouldn't hurt. It actually seems to help the pines and the evergreens.

*****

BY MR. TOOMEY:

Q. How close to your house are your condensers? A. Well from the house itself probably 30 feet, 35 feet, maybe 40.

*****

48 CROSS-EXAMINATION

BY MR. FRIEDLANDER:

*****

Q. And do you have a cover on top of your machine to throw the moisture in the direction of your house? A. No, they are just flat on
49 the top and the moisture goes up straight until it begins to hit the trees which now hang over the machine very nicely.

Q. Now would you say that the Zola machines had a top to them or

a cover to throw the moisture— A. I have seen a half a hood on top of them recently. I don't know when it was put on. It's a curved hood that seems to come over half of the top of the machine. The top of the hood is perhaps two or three feet above the top of the machine.

Q. Well, was that put on after your visit to the Hadley place in the summer? A. I didn't see it there last summer. It wasn't there at all when I was observing this in the summer. It was there, when I was observing the situation this present spring.

*****

50 Q. And the loud hum that you spoke of—that's the way you described the noise? A. Yes, we can hear that hum in our patio which is perhaps 35 or 40 feet from the machine, but by the time it reaches our patio it's not loud enough to be a nuisance.

Q. You are familiar with the physical facts enough to know that sound travels? You know that, noise will travel? A. That's right, sir.

Q. With the right wind you can hear something quite a distance away, can you not? A. Yes.

Q. And a difference of 10 feet or 8 feet would have no effect on
51 noise, would it? A. I am not an expert in sound engineering and I can't comment on that, sir.

*****

REDIRECT EXAMINATION

BY MR. TOOMEY:

Q. Mr. Bogan, you have described the stone wall which separates your property from Dr. and Mrs. Zola's property. A. Yes, sir.

Q. Would you have any objection to these two machines being placed over against your stone wall?

52 *****

THE WITNESS: No, we have no objection to having those machines located so that they don't bother anybody. If they are against our wall, they are still on the Zola property, and it is obvious if it's physicall possible that those machines could be located so they would be easily a hundred feet from any house except the Zola house.

*****

53 RECROSS EXAMINATION

BY MR. FRIEDLANDER:

*****

Q. How far are the Zola machines from the Zola house presently? A. Visually at the nearest point I would guess—I'm just
54 guessing— 20-25 feet

*****

56 MARCINE STEELE

called as a witness by the plaintiffs, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

*****

Q. Where do you live, Mrs. Steele? A. At 2328 - 20th Street, Northwest.

57 Q. Are you acquainted with Mr. and Mrs. Hadley? A. Yes, sir.

Q. And for approximately how long? A. Fifteen years or more.

Q. Have you had occasion to visit their home on Cleveland Avenue? A. Frequently.

*****

Q. Now did these entertainments on the patio take place last summer or this summer? A. More before last summer, none this summer really.

Q. Now in the course of your visits have you at any time noticed anything unusual by way of either moisture or noise while you were seated on the patio? A. Yes, I have.

Q. And would you describe the noise to us? A. Well, I think it is a noise and you know it's there because it is in competition with the fountain which they put in.

Q. Have you noticed anything with regard to the moisture? A. Yes, I have, particularly early in the morning when I have stopped by.

Q. And what is that? Could you describe it? A. Well, it's a
58 cloud of moisture. It's unbelievable to me.

Q. Now have you noted this noise at any particular location on the patio in greater volume than at another location on the patio? A. Oh, yes, of course. The corner, which is the obvious one where guests might sit, of course is closer to this air-conditioner, that's true.

Q. Have you ever observed the air-conditioner from the property of Mr. and Mrs. Hadley? A. No, I can't see it unless I look over the fence. I didn't know what it was.

Q. You've never looked over the fence so you've never personally observed the proximity of the air-conditioner? A. I have recently, but as I was sitting there as a guest I didn't notice it.

Q. How close would you say is the nearest point on the air-condenser to the nearest point of the Hadley patio? A. Oh, I would say a foot. If you sit in the corner of the patio you are on top of the air-conditioner.

*****

CROSS EXAMINATION

BY MR. FRIEDLANDER:

*****

59 Q. Would you say that the chair which appears in this picture is a chair that you have occupied? A. Yes, or one similar, often, uhuh.

Q. Do you know why that chair is next to the fence? A. Because it is obvious to have it in the corner. That's where people like their patio furniture and particularly in a small area such as they have.

Q. How large a patio is it? A. It's quite small but adequate if you don't have other noises pushing you to other corners. I can't tell you how large.

*****

60 Q. Now prior to 1963, say in the summer of '62, could you notice the moisture?

*****

THE WITNESS: This is the only summer that I have noticed it actually, I mean last year, last summer.

BY MR. FRIEDLANDER:

Q. 1963? A. I can't tell you the date. Yes, 1963; yes, last year, uhuh.

61 Q. Now can you tell us whether or not the fountain makes any noise at all? A. Very slight, but it's a pleasant noise and you can't hear it now when the conditioner is on.

Q. What sort of noise does the fountain make? A. Oh, sort of a drip, like any fountain makes.

Q. Is it a small fountain or large fountain? A. A very small fountain.

Q. And does it have a spray that goes into the air? A. No, of course not, it drops down.

*****

Q. What sort of fountain is it? Can you describe it to us? A. Well, it isn't a utilitarian one. You don't drink there. You just want to watch it. It's just pretty. It's part of the background.

*****

Q. And how does the water get to the base? A. It comes out of the mouth of the object which is on the fountain.

Q. What is the object? ***

62 A. It's an animal figure at the moment.

*****

A. No, no, it goes straight down. It's like a waterfall.

Q. And from what height does the water fall? A. I would say three feet.

Q. And when you sit near the fountain can you feel the spray? A. No, of course not. It's very slight.

*****

Q. And the noise that you described as a dishwasher—you said
63 it was a dishwasher—you said it was annoying—how loud was it?

*****

THE COURT: Just a moment. Was it sufficient to interfere with conversation?

THE WITNESS: Yes.

BY MR. FRIEDLANDER:

Q. And was it a humming sound? A. I would describe it as more or less a humming sound.

*****

64 Q. Did you ever notice during this year any moisture coming from them? A. Early this year, yes, in the morning.

Q. And when was that? A. I would say it was in April.

Q. You heard it in April, too? A. I can't tell you the exact date.

Q. Well, was it the month of April? A. Well, it would have needed to have been the very first week in April.

Q. The first week in April you heard the air-conditioning units operate? A. I don't know. No, I expect I didn't.

*****

66 Q. Now have you ever seen the equipment since September of 1963? * * * A. Not until yesterday.

*****

Q. And do you state as a fact that when you saw it yesterday you could see moisture coming? A. No, I did not.

*****

LESTER M. HARMON

called as a witness by the plaintiffs, having been first duly sworn, was
67 examined and testified as follows:

DIRECT EXAMINATION

BY MR. TOOMEY:

Q. Would you state your full name, please? A. Lester M. Harmon.

*****

Q. And what is your occupation? A. Manager of J. H. Small & Sons Nursery at Norbeck and also supervise landscape work.

THE COURT: Supervisor of what?

THE WITNESS: Supervise landscape work.

*****

Q. For how long have you been engaged in the general field of landscaping and gardening work? A. Twenty-eight years.

Q. And for how long have you been employed by Small's? A. Twenty-eight years.

*****

68 Q. Now, directing your attention to the roses, when you said a certain number of roses, did you mean rose bushes? A. Rose bushes. They purchased those from us and asked us to plant them, so we sent in the men to do the planting of the roses and made the preparation and planting, and then later on in the season they complained that the roses, the foliage was turning yellow and dropping off,

69 and I told them I'd come by and look and see what the difficulty may be, and it was a case of black spot and mildew.

*****

Q. Now what caused this, from your observation? A. Well, excess moisture will bring that condition on, and of course the only way you can control it is through fungicide spray.

*****

Q. Well, were you able to do anything to save the rose bushes? A. No. At that time I advised them that they would possibly have to spray. Of course, if the condition continued or that is the thing that brings on the condition and moisture and lack of air, and of course with the fence and so forth, the circulation of air wasn't the best, but although they should have grown there all right, because many times we plant them in areas like that and have no trouble.

Q. Well, did the roses improve? A. No, sir, they got worse as time went on and this spring again—he also had a climbing rose in the
70 corner there which has since died, and this spring about four weeks ago we made replacement on the roses and also replaced a new rose in the corner, a climber.

Q. Well what in your opinion caused the death of these plants? A. I think it was the—from what I could see, with the amount of black spot and mildew that were in the roses and the way the foliage was formed, was excess moisture.

Q. You have identified from Plaintiff's Exhibit No. 1 as the little garden along the fence as being the place where the roses were planted? A. Yes, sir.

*****

CROSS EXAMINATION

BY MR. FRIEDLANDER:

*****

72 Q. Well are you sure you didn't plant these rose bushes in April and May? * * * A. I think it was in the month of April.

Q. And when you planted them, did you hear any noise from the next-door neighbor? A. No, sir.

Q. Now did you go back during the summer at any time of '63?
73 A. Yes, sir.

Q. When? A. It was in, somewhere I think in June or July.

Q. Now when you went back in June or July you heard noise, did you? A. No, I went back to check the roses.

Q. Well, didn't you hear this noise from the next-door neighbor? A. No, I didn't hear the noise. I observed one time the moisture that was—

*****

A. I think at the time I was there at one time this cooler started and there was a blast of moisture that went up at that time. That's all I ever observed.

Q. Well you saw the moisture go up in the air? A. Yes, I think the machine started and this moisture all went up at one time.

Q. Yes, and then it stopped? A. I suppose it stopped. I don't know.

Q. Well did you observe it any more? A. No, I had no occasion to. I mean I was just there to examine the roses.

*****

74 Q. Well isn't it customary to spray rose bushes during the spring in order to prevent this fungus? A. Yes, sir.

Q. Fungus is a disease, is it not? A. Yes, sir.

Q. And you spray to prevent the disease? A. Yes, sir.

Q. Had these rose bushes been sprayed? A. Yes, sir.

75 Q. And they still had the black fungus? A. Yes.

Q. Have you ever seen rose bushes have the black fungus where there was not excessive moisture? A. Yes, sir.

Q. Lack of air you mentioned—you mean if you plant a rose bush too close to a wall or a fence and the air doesn't circulate the rose bushes may become ill from black fungus? A. Yes, but mostly under normal conditions you can keep this under control, but moisture that is there I would say other than what is under normal condition, it is pretty hard to control.

*****

Q. If you had this fountain with the spray being blown continuously across to the rose bushes, would that cause black fungus? A. There is no spray from the fountain. It is just a drip. It is not possible for any spray to come or be blown from it because it is too close to the

wall. It is not possible anyway at all for any spray to come from that fountain.

*****

78 Q. Did you go back in April or May? A. We went back, I think it was in the latter part of May.

*****

Q. Of 1964? A. 1964.

Q. Now what noise did you hear from the neighbor next door? A. I didn't see no spray at that time.

*****

79 JOHN C. JUDGE

called as a witness by the defendant, having been first duly sworn, was examined and testified as follows:

*****

80 DIRECT EXAMINATION

BY MR. FRIEDLANDER:

Q. Would you tell us your full name, sir? A. John C. Judge.

Q. And what is your occupation or profession? A. I am a Supervising Engineer for the Washington Gas Light Company in the Air-Conditioning Department.

Q. What are your educational qualifications, sir? * * * A. I have a Bachelor of Civil Engineering from the George Washington University and also a B.S. degree from Union College.

Q. And what is your specialization or what sort of work do you do for the Gas Light Company? A. I am a Supervising Engineer for the air-conditioning installations.

Q. And what is the difference between the gas air-conditioning units and the electrical units? A. Well, there's a number of differences. One of the main differences, in my opinion, in reference to
81 this case, is the relative quietness of air-conditioning, gas air-conditioning equipment, compared to electric.

*****

THE COURT: I am not going to try any controversy between PEPCO and the Washington Gas Light Company over the merits of their respective apparatus. I will leave that to the advertising media. I have heard enough advertising on the part of both on the radio broadcasts.

*****

BY MR. FRIEDLANDER:

Q. Now in the Zola case did you have anything to do with the
82 installation? A. No, sir; I did not.

Q. Did you have occasion to go to the scene at any time? A. Yes, sir; I have.

Q. How often would you say you had observed the installation in the Zola? A. I would say on approximately three different occasions I have been at the Zola residence.

Q. Now will you tell us when they were? A. Twice last summer and also yesterday I was there.

Q. Now did you have, or have you ever seen this document which has been marked Defendant's Exhibit 3, for identification? A. Yes, sir: I have.

Q. Will you tell us what it is? A. It is an American Refrigeration Institute Recommended Code for municipal ordinances to get some standardization as far as noise is concerned from air-conditioning equipment.

MR. FRIEDLANDER: Now we would like to offer this in evidence. I will show it to counsel.

*****

MR. TOOMEY: Your Honor, I object to this on the basis—

THE COURT: I am going to sustain the objection. What some institute recommends is not competent. I have to determine on the
83 evidence in this case as to whether there was excessive noise and excessive moisture so as to constitute a nuisance. The mere fact that a trade association makes a certain recommendation, and if it be the fact that the apparatus conforms to that recommendation, would not be competent.

*****

BY MR. FRIEDLANDER:

Q. Will you tell, Mr. Judge, whether or not any standards are used in the industry in the Dstrict of Columbia by people installing air-conditioning units? A. The District of Columbia has certain code requirements for the installation of gas air-conditioning, or for any

air-conditioning equipment, but it is not based on noise criteria; it is based upon distances.

Q. Now when you checked on this unit, was that because of some complaint that had been received? A. Yes, sir.

Q. And do you know from what source you had the inquiry to check? A. Well my visits had been both because of the complaint by the Hadleys and also because of certain problems the Zolas were having as well.

84 Q. And when you went to visit the scene for the first time were you accompanied by anyone else? A. Yes, sir.

Q. And did you there talk to Mr. and Mrs. Hadley? A. Yes, sir, last year on one visit we specifically went to the Hadleys to talk with them to find out what the problem was.

Q. Now, will you tell the Court what the conversation was that you had with the Hadleys and particularly tell us whether your conversation, what part was with Mrs. Hadley and what part was with Mr. Hadley? A. Well, it is fairly difficult to say as far as to whom we were talking to at the time, but as I remember, most of the conversation was with Mrs. Hadley, and Mr. Hadley would discuss a few points every now and then, but the main contention was that the equipment located in the Zola's yard was of a noise level that was bothering them, and also their entertaining on the rear patio, and also the volume of water vapor that this equipment emitted, and it seemed to be more severe at least in the morning time when it is fairly cool in the morning, and at that time I told Mrs. Hadley, 'Well, there are a number of things that we can do to lower the noise level of the equipment. We can possibly put some acoustical lining in the towers. We
85 can put hoods on the equipment to discharge this water vapor into the Zola's yard." But Mrs. Hadley was of the opinion that this was not satisfactory, that she wanted the equipment moved. She would not go along with those suggestions.

Q. Did you make any change in the equipment, nevertheless? A. Yes, sir; we did. We did put the hoods on top of the equipment to discharge this water vapor, a more positive discharge of the water vapor towards the Zola's house away from the Hadley's yard.

Q. And do you know when that was done? A. Not exactly. I believe it was some time in August; I'm not sure.

THE COURT: August of what year?

THE WITNESS: 1963.

*****

86 Q. Now, as a result of that conversation did you cause any changes to be made in the machine? A. Yes, sir, we had a contractor install hoods on top of the two towers located adjacent to the Hadley garage to discharge the air and any moisture directly toward the Zola's house rather than having it diffuse in the air and possibly air current cause it to go over the fence into the Hadley's patio area.

Q. Was this change, in your opinion, successful? A. In my opinion, yes, sir.

Q. And where is the moisture discharged now since the change? A. It is discharged towards the Zola's yard.

Q. And do the vapors now, do they go up high in the air or are they thrown to the ground? A. Well, they are thrown at a horizontal angle. Wind currents could possibly diffuse them up in the air, but they are thrown in such a manner that it would take a rather strong wind to cause them to flow over the fence.

Q. Now, can you tell us about the noise of this equipment? A. I would say, listening to it yesterday, that it's an average noise, and it is no noisier than any other equipment we have, and it's in good working order, and to me—of course possibly I am slightly biased—it's
87 not overduly noisy.

Q. How would you describe it? A. I would describe it as a fan noise, because that is primarily what it is. It's a centrifugal type fan blowing air through the cooling tower. It's a whirring or a purring type noise.

Q. And how far away can this noise be heard, in your judgment? ***** A. Oh, I would say 50, 60, 70 feet, possibly further.

Q. Then moving the equipment some eight or ten feet would have no effect on hearing the noise? A. Relatively little in this case.

THE COURT: Well, if it were moved 30 feet, would the noise be—

THE WITNESS: It would be reduced. It depends on where it was moved now, also.

BY MR. FRIEDLANDER:

88 Q. Now, have you been over the Zola yard? A. Yes, sir.

*****

Q. Where are they installed, Mr. Judge? A. They are installed directly the rear wall of the Hadley garage.

Q. Is that a brick wall? A. Yes, sir; it is.

*****

Q. In other words, they are not by the fence? A. No, sir.

Q. They are by the garage brick wall? A. Yes, sir.

THE COURT: How much space is there between the garage and this apparatus?

THE WITNESS: Looking at it yesterday I would say between 12 and 18 inches. I didn't measure it exactly.

89 *****

BY MR. FRIEDLANDER:

Q. When would spray come from this machine? A. Mainly in a morning period when the outdoor temperature, when the humidity is high enough to casue the air-conditioners to be operating, but the morning has to be failry cool as well, because there is always this water vapor being discharged from the condenser but it is in a different form. It could be actually in a gaseous form as in most of the cases, but on a cool morning this vapor will condense into a spray or water droplets. So it depends a great deal on the climate or the

90 temperature outdoors. The conditions have to be right for this water vapor to be in a droplet form, and I would say it's probably, oh, maybe ten or less per cent of the time would it actually be in droplet form. Most of the time it will be in a gaseous form.

*****

THE COURT: Why is it necessary to have water in the apparatus? Now, I have an air-conditioning unit in my bedroom and another one in my living room. There is no water in them.

*****

91 BY MR. FRIEDLANDER:

Q. And what are the advantages and disadvantages of the two

types, would you tell us? A. A water cooler type system doesn't depend on the outdoor temperature. As the outdoor temperature increases the capacity of a water-cooled piece of air-conditioning equipment will decrease whereas water-cooled equipment, or air-cooled equipment will decrease, water-cooled equipment will actually stay constant.

THE COURT: Well now, why is it necessary to have this apparatus outdoors back of the house?

THE WITNESS: Because what heat we remove from the house has to be discharged to the outdoors and this is the piece of equipment or the apparatus that discharges the heat that we remove from the house to the outdoors.

*****

92 BY MR. FRIEDLANDER:

Q. I was going to ask you, sir, what is the general method of air-conditioning in the city, water-cooled or air-cooled? A. Large installations, most of it is water-cooled. Residential, I would say, for the major part it is air-cooled.

Q. Is this a large house, the Zola house? A. By most standards it is; yes, sir.

*****

93 Q. Now, was the noise level, when you inspected it originally in the summer of 1963, at an objectionable level? A. I would say not, no, not for air-conditioning equipment.

THE COURT: You know, Mr. Friedlander, as I understand it, and certainly the evidence indicates, there is no contention here that this apparatus was defective or that it was not as good as other apparatus of its kind. The only point that is made is it did not have to be so close to the Hadley property, and if it is moved 20 or 30 feet away and surrounded by bushes the way Mr. Bogan did his, that most of these troubles would be cured.

Isn't that the point you raise?

*****

BY MR. FRIEDLANDER:

Q. Will you tell us, sur, looking at the diagram of the Zola place, is there any other place which you could, in conformity with

District of Columbia regulations place this equipment? A. Yes, sir,
94 I would say there are other areas.

Q. All right, now will you point out to the Court, tell the Court first the first area you could put it? A. Probably the only other existing area would be along the high stone wall—I believe it's Mr. Bogan's wall—to the northwest of the house.

Q. What would be the effect of placing it there? A. It's difficult to say, but judging at the character of the surrounding area it may not make any difference as far as the noise level is concerned in the Hadley patio. The reason I say that is that this is a wall of about, well it's at least as high as the garage wall, the stone wall adjacent to the Zola's northwest boundary, and it might act as a sounding board and actually direct the sound more towards the Hadley's patio than where the units are placed now.

*****

BY THE COURT:

Q. Could the apparatus be moved towards the middle of the lot so that it would be 30 feet away from either neighbor? A. It could be put
95 in the middle.

BY MR. FRIEDLANDER:

Q. And what would be the effect of that? A. You would be moving it approximately, oh, maybe 10 feet from where they are now, and seriously I don't think that ten feet would make too much difference in the noise.

BY THE COURT:

*****

Q. If this lot is 60 feet wide, you could move it 30 feet away, couldn't you?

MR. FRIEDLANDER: If Your Honor please, the 60 feet is lengthwise across.

BY MR. FRIEDLANDER:

Q. How deep is this lot from the back of the house to the corner?

MR. FRIEDLANDER: Would Your Honor look at this to get the picture.

THE WITNESS: It doesn't show any real distance.

THE COURT: This is not in evidence yet, is it?

MR. FRIEDLANDER: Yes, it is.

*****

96 THE COURT: Surrounding it by high bushes would help, would it not?

THE WITNESS: That would help to absorb some of the sound, yes.

*****

MR. FRIEDLANDER: We will offer testimony to show that that suggestion has already been rejected by the other side.

THE COURT: What has been rejected?

MR. FRIEDLANDER: The offer to surround it with bushes.

*****

BY THE COURT:

Q. Is it possible to locate this, say, 25 or 30 or 35 feet from the
97 boundary line of the Hadley property? A. Not exactly. I don't know the exact distance. I would say some place possibly 20, 25 feet from the boundary line would be the farthest you could get away from the Hadleys.

Q. And then if you did that and surround it by bushes, that would cure some of the difficulties, would it not? A. It would possibly make it quieter.

Q. Yes. And also it would affect the moisture?

Would it prevent the moisture from reaching the Hadley property? A. I couldn't guarantee it because it would be directed then towards the Hadleys, you see, if we put it in that position.

*****

BY MR. FRIEDLANDER:

Q. Now at what point would you, by moving it that distance, at that
98 point, block exit, from the rear yard to the front yard? A. Well, we would have to make sure we didn't block the exit from the rear yard and that would mean we would only be moving it approximately 15 or 20 feet from where it is now.

Q. And would that have any appreciable effect on the noise as such? A. I can't really say that it would. In fact, as I said before,

locating it next to this stone wall could actually increase the noise. There could be that possibility.

THE COURT: The question wasn't whether it could be located against the stone wall but whether you could locate it somewhere in the middle of the lot away from the wall, and I believe you said it is possible.

THE WITNESS: Yes, it is possible.

*****

BY MR. FRIEDLANDER:

Q. I am a little confused. Could you point out to me on Defendant's Exhibit 1 how you would do that, sir? A. Well, I believe in the middle of the rear yard would be some place in this vicinity.

Q. Have you ever had an installation in the middle of a yard?

99 A. No, sir.

Q. To your knowledge would you recommend it or not recommend it? A. I would not recommend it.

THE COURT: You would not recommend what?

THE WITNESS: Placing it in the middle of anyone's yard.

THE COURT: Why not?

THE WITNESS: Because normally this would make the rear yard useless as far as any activities are concerned.

THE COURT: Well, of course, if people want an apparatus like that, it might interfere with other uses of theyard. There is no question about that.

*****

CROSS EXAMINATION

BY MR. TOOMEY:

*****

100 Q. Now directing your attention to Plaintiffs' Exhibits 2 and 9, these correctly show the location of the two pieces of the unit, do they not? A. Yes, sir.

Q. Now, one of the two pieces actually is right up to the end of the garage wall, is it not? A. That's correct.

Q. And hence is right next to the fence? A. Within—

101 Q. Inches of the fence? A. Twelve to eighteen inches.

*****

102 Q. In your opinion the units could be moved back along the stone wall of Mr. Bogan's? A. Yes, sir.

Q. And they would work just as well along there? A. Engineer-
103 ing-wise, yes.

Q. With regard to closeness or proximity to the Hadley patio, a move over to the center of the stone wall as shown in Plaintiffs' Exhibit 8—you recognize the stone wall in Plaintiffs' Exhibit 8? A. Yes, sir.

Q. A move of both units over along this tone wall in that area would actually move it 20 to 25 feet from the Hadley patio, would it not? A. Approximately, yes.

Q. As distinguished from one of the units today being a foot to a foot and a half removed from the patio; is that correct? A. Yes, sir.

*****

104 Q. Mr. Judge, as a matter of fact, you, of your own personal knowledge, do not know whether the hoods being placed on these two machines have successfully eliminated the moisture problem or not, do you? A. Not firsthand knowledge; no, sir.

Q. As a matter of fact, you have never been there since the hoods have been placed on when there was moisture, have you? A. As a matter of fact, I have never been there when there was moisture, whether the hoods were on or not.

*****

REDIRECT EXAMINATION

BY MR. FRIEDLANDER:

105 *****

Q. As a result of those reports did you learn in the regular course of business the results of the installation of the hoods? A. Yes, sir. I personally didn't make visits to determine whether the moisture problem had been alleviated or improved, but a number of my subordinates had, and by their reports I assumed that the problem had been corrected as far as moisture being emitted or ejected into the Hadley's rear patio.

*****

106 SAMUEL ZOLA

a defendant, was called as a witness in his own behalf, and having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. FRIEDLANDER:

Q. Would you state you full name? A. Samuel Zola, M.D.

*****

107 Q. And where do you live? A. 2810 - 31st Street, Northwest.

Q. And how long have you lived there? A. Approximately 17 years.

*****

108 Q. And did there come a time when you decided to remodel your house? A. Yes, sir.

Q. Was that before or after the Hadleys had moved into the neighborhood? A. After the Hadleys had moved in.

Q. And did you get advice from architects and engineers as to the remodeling? A. Yes, sir, I hired an architect to advise me in my entire remodeling of my house.

Q. And did there come a time when you had advice as to the installation of an air-cooling system, water-cooling system? A. Not only had the advice of my architect but I hired an air-conditioning engineer.

Q. What was his name? A. Dollar and Blitz.

*****

109 Q. Who decided where the towers would be located? A. My architect, with the advice of the engineers, the air-conditioning engineers.

*****

Q. * * *

Now, I will tell you from looking at that map—tell us whether there was any discussion as to the location of these towers before they were located? A. Quite a bit of discussion, sir.

Q. And did you rely on the advice that was given by certain firms or companies? A. Well, I took their advice. That was all there was to it.

*****

110 Q. Now, Doctor, after your air-conditioning unit was installed and started to operate in the late spring or early summer of 1963, did there come a time when you heard from Mr. or Mrs. Hadley? A. Yes, sir. I received a letter from them.

Q. And as a result of receiving the letter did you contact the gas company? A. I immediately contacted the gas company.

Q. And as a result of your contact, did they come to the place to investigate the unit? A. Yes, sir.

Q. Now, did you ever have a conversation with Mrs. Hadley in which you explained to her that you would put trees or shrubs around these units? A. Well, we had a few conversations in which I told her that as a neighbor I would do my best to try to avoid any inconvenience and that I called the gas company and I had obtained a landscape
111 specialist and I was going to even put a wall, a little brick wall—we have plans to put a little brick wall with landscaped areas to try to make the noise as liveable as possible.

Q. Now was it a loud noise that you were getting? A. Well, sir, we have our chairs sitting right next to it. I'm sure that—well, we drink and entertain people there and sit around and it isn't that disturbing to us.

Q. Your chairs are by these units? A. Eight or ten feet from them, although some of them are next to them.

Q. And you do entertain there? A. Yes, sir.

Q. Now, how about the moisture from the machines? A. Well, when the machines were first installed at times, as Mr. Judge has said, there are a few times when there is some moisture thrown up in the air. When the Hadleys complained to me and wrote me a letter and called me, I immediately called the gas company and insisted that this be looked into. When they looked into it, they recommended we put hoods on, and in putting the hoods on they told me that the moisture would be thrown into my yard only, so I accepted this and had them put the hoods on to put the moisture into my yard and to try to prevent any trouble.

Q. And when the hoods were put on, are you able to state to the
112 Court what happens to the moisture when there is any moisture? A.

As Mr. Judge has stated, these hoods cover it and it's thrown directly into my yard away from the Hadleys.

Q. Now, do you have any rose bushes growing on that brick wall? A. Yes, sir, I have rose bushes right next to the, on the fence between the Hadleys and my home and on Mr. Bogan's wall flourishing and doing well.

Q. And there's been no ill effects from the moisture from the machines? A. No, sir, as a matter of fact, during the construction of my home the builders had taken very little care of these rose bushes and at one time I thought that they were not going to make it, but since we have been living there we have taken care of them and they have done very well in my opinion.

Q. Now, Doctor, during this year, 1964, during April, did you have the air-conditioning unit on? A. No, sir.

Q. When did you put it on this year? A. Towards the first of May. I think it was in May when we turned them on.

Q. Now, at that time could you hear the sound and can you describe what sound the units make? A. Well, when I'm in the house
113 I can't hear the sound at all. As a matter of fact, before we put this air-conditioning unit in, we had a window unit which made more noise and was directly overhanging the Hadley's yard, which we removed. This unit, when I'm in the house I cannot hear at all. When I'm in the yard I can hear this purring noise.

Q. What sound? A. Purring noise.

*****

Q. Well now, so far as the garage is concerned, do you know from your own knowledge when it was last painted? A. Well, I've lived in that area before the Bogans moved in, before the Hadleys moved in, and ever since I have been there the woodwork above the garage, directly above the coolers, the small piece of wood, and the brick had never been touched, and the wood is still in pretty good shape.

*****

114 Q. Now, Doctor, in this lot of yours which is irregularly shaped, is there any place that was discussed before the decision by the engineers and architects to put it where it was placed? A. I was led

to believe, or I was told by my architect, who after consultation with the air-conditioning engineers, said I had no choice, that the gas company was spending—

MR. TOOMEY: I will object to this, Your Honor. It is purely heresay.

THE COURT: Objection sustained.

*****

115 Q. Do you know whether or not you could place a unit such as this against any of your windows? * * * A. I was told I have six-foot windows and I was told that if the units went above the ledge of the window it was gainst the law. I was also told that if I moved them on the other side of my house that I had to put them eight feet from the government property, which is the alley on that side of the house, and therefore if I brought it in far enough I would cut the exit off from my back yard and it could not be placed there legally.

*****

116 Q. In other words, if you placed them in your front yard— A. Well, I think the other neighbors would object, too, just from the looks of the thing. I don't know. I don't think people put these in their front yards.

*****

Q. Well, does this well, does that occupy—what size space does it occupy on the stone wall? A. Well, it's a semi-circular type of thing and I would say it bulged out into the yard four or five feet. In other words, if you put the air-conditioners up against this thing it would cut the exit off to my back yard, and I do not know whether this is according to the law to cut off an exit.

*****

117 CROSS EXAMINATION

BY MR. TOOMEY:

Q. Doctor, I believe your testimony was that from your house you hear no noise from the machines? A. No, sir, I don't. The windows and doors are closed.

Q. How far removed from your house approximately are the machines in their present location? A. From one edge of the house

to the edge of my porch I would say 10 feet, 15 feet. I have never measured it. I mean I'm just guessing at that.

*****

118 ORAL OPINION OF THE COURT

THE COURT (Holtzoff, J.): The Court finds that although this machine is not a nuisance per se, it is a nuisance in its present location because of the noise and moisture. The Court also has in mind that there are types of machines that perform the same type of operation and are air-cooled and therefore do not involve the problem of moisture, and that residences, according to the testimony, use more machines of the air-cooled type than of the water-cooled type such as is involved here. However, the Court is not going to require this defendant to remove the water-cooled apparatus, but the testimony establishes both an inordinate amount of noise and an inordinate amount of moisture emanating from the apparatus in the direction of the plaintiffs' property, and the Court will decree that as presently located the apparatus is a nuisance and that the nuisance can be abated by moving the apparatus farther away from the plaintiffs' property and surrounding it by bushes. The Court would not require the defendant to do anything beyond that.

119 A transcript of the Court's oral remarks will constitute the findings of fact and the conclusions of law. You may submit a proposed judgment in accordance with the Court's oral decision.

*****

MR. FRIEDLANDER: I was going to argue the case. I'm sorry. I will say to counsel I do not know what the form of the order is going to be, but if it is in the form of an injunction against—

[Filed, September 3, 1964]

PLAINTIFF'S EXHIBIT 3

Dear Mr. Hadley:

I am in receipt of your letter concerning the matter of our air conditioning condensors.

You must have obviously noticed, although not of our choice, our construction job is not as yet complete—painting, grading, rear lawn area, etc. Our attorneys are now in the process of completing same to our satisfaction. I have forwarded your information both to my attorneys and to the engineer of the Washington Gas Light Company, for information so we may correct the situation. Even if we are within the proper boundary limits, regardless of cost to me, I will make every effort to correct the situation of the "noise" if at all possible.

As I have previously stated, I will do my utmost to make any adjustments to remedy any situation that may be uncomfortable to you, or not correct.

Sincerely,

/s/ Samuel Zola, M.D.

[Filed, July 1, 1964]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on to be heard at this term upon the pleadings and the testimony, whereupon this Court on the 1st day of July, 1964, enters the following:

FINDINGS OF FACT

1. That although the machine and the air-conditioning condensers on defendants' property are not a nuisance per se, they are a nuisance in their present location because of the noise and moisture emanating therefrom, they being located very closely to the plaintiffs' property.

2. That the nuisance can be abated by moving the apparatus further away from the plaintiffs' property and surrounding it by bushes.

3. The undisputed evidence shows that there are on the market two types of air-conditioning apparatus for residences, of the air-cooled type and of the water-cooled type; that the air-cooled type does not emanate moisture; that the apparatus on defendants' property is of the water-cooled type; that apparatus of the air-cooled type is less expensive and more prevalent for residences.

CONCLUSIONS OF LAW

1. That the air-conditioning condensers in their present location constitute a nuisance which can be abated by changing the location of said air-conditioning condensers and the plaintiffs are entitled to a decree accordingly.

/s/ Alexander Holtzoff, Judge

[Certificate of Service, dated July 1, 1964]

[Filed, July 1, 1964]

JUDGMENT

The findings of fact of the Court, having been made a part of the record herein, and the Court having found for the plaintiffs, it is, by the Court this 1 day of July, 1964

ADJUDGED that the air-conditioning condensers in their present location constitute a nuisance which can be abated by moving the location of said air-conditioning condensers, and the said defendants, Samuel Zola, and Gloria Zola, are hereby directed, within 60 days from the date hereof, to remove the said air-conditioning condensers from their present location and not to install them at any location which will continue the nuisance complained of herein.

/s/ Alexander Holtzoff, Judge

[Filed July 10, 1964]

NOTICE OF APPEAL

Notice is hereby given this 10th day of July, 1964, that Samuel Zola, M.D. and Gloria Zola hereby appeal to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 1st day of July, 1964 in favor of Harlan V. Hadley and Ann Obenchain Hadley against said Samuel Zola, M.D. and Gloria Zola.

FRIEDLANDER & FRIEDLANDER
/s/ Mark P. Friedlander
Attorney for Defendants

DLB-WEB-SW
3-17-65
(2)

BRIEF FOR APPELLEES

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,941

SAMUEL ZOLA, M. D.
and
GLORIA ZOLA,

Appellants,

v.

HARLAN V. HADLEY
and
ANN OBENCHAIN HADLEY,

Appellees

Appeal from the United States District Court for the District of Columbia

JAMES C. TOOMEY
910 17th Street, N.W.
Washington, D.C.
Attorney for Appellees

QUESTIONS PRESENTED

The questions are correctly stated by appellants.

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BRIEF FOR APPELLEES

JURISDICTIONAL STATEMENT

The jurisdictional statement is correctly stated by appellants.

COUNTER STATEMENT OF FACTS

The appellees agree with the statement of facts as set out by appellants except for the following additions. The air-conditioning unit which services appellees' home is immediately adjacent to the wall of the garage belonging to appellees (J.A. 7). The units of the Bogan household are identical to appellants' units, except that they are older and noisier, but are buried in a high grove of evergreens and shrubbery which lessens the noise and moisture (J.A. 13).

The units installed on the property of appellants are large, 2-1/2 feet long, 3 feet wide and 5 feet high. They are located immediately adjacent to the property line of property of appellees (J.A. 7), and approximately one foot removed from the appellees' patio (J.A. 16). The appellees have a small fountain installed on their garage. There is no spray from this fountain (J.A. 17, 20 and 21).

The appellees have been unable to use their patio area because of the noise and moisture (J.A. 6). In addition, the moisture is of such extent that rose plants have been killed (J.A. 6, 17). A split-picket fence separates appellees' property from the property of appellants (J.A. 5). The two machines complained of are located at either end of the garage wall of appellees (J.A. 8).

The evidence of a standardized measure for noise emanating from air-conditioning equipment offered by appellants was an American Refrigeration Institute Recommended Code and was not competent evidence (J.A. 22). There are no Code requirements or standards controlling noise levels as concerned here (J.A. 22, 23).

SUMMARY OF ARGUMENT

The preponderance of the evidence received by the Court in this case showed clearly that the operation of the air-conditioning condensers created an excessive noise and excessive moisture. The standard to be used in determining what constitutes a nuisance is whether or not the thing complained of produces such a condition of things as, in the judgment of reasonable men, is naturally productive of physical discomfort. This test applies to persons of ordinary sensibilities and of ordinary tastes and habits. Further, in view of the circumstance of the particular case, the use of the object creating the nuisance is unreasonable. This standard has been met.

Appellants refer in their summary of argument and on page 10 of their argument to a statement made by the Court with reference to a personal experience the Court had had. This statement was made in response to an inference that the complaints of the appellees were imaginary. Certainly the Court did not display any pre-judgment on the case. Again, appellants in their summary of argument, point out a statement made by the Court which appears on page 25 of the Joint Appendix. The Court said: "Why is it necessary to have water in the apparatus? Now, I have an air-conditioning unit in my bedroom and another one in my living room. There is no water in them." This was a question directed to John C. Judge, an engineer for the Washington Gas Light Company, and was made by the Court to gain information about the difference between various types of air-conditioning units. Certainly, the appellants are not contending that the Court was biased or prejudiced in its judgment of the case.

ARGUMENT

I

The Preponderance of the Evidence Set Out That the Machinery Complained of Is a Nuisance in Its Present Location Because of the Noise and Moisture Emanating Therefrom.

This is a suit to enjoin a nuisance. The nuisance complained of is that certain air-conditioning condensers when operating create a noise level which is high enough to become a nuisance to the plaintiffs or guests of the plaintiffs while seated on their patio. In addition, the said condensers create a condensation in the air which settles on the property of plaintiffs. Appellee Hadley testified that commencing in the spring of 1963, following the installation of this machinery, there was a noise and a visible column of mist and excess humidity (J.A. 5, 6). Further, that the noise is such as to make conversation difficult (J.A. 6); that the machines while operating make a noise comparable to a washing machine (J.A. 7, 8); that the noise was somewhat greater on June 28, 1964 than it had been a year prior to that date (J.A. 10). Eugene F. Bogan, witness for appellees, testified that he had seen the column of moisture drifting over the patio of appellees (J.A. 12); that the machines produced a loud noise or hum (J.A. 13); that this witness had the same type of air-conditioning machine as appellants but has them buried in evergreens and bushes to eliminate the noise and moisture problem (J.A. 13); that the loud hum heard by Mr. Bogan is such that it can be heard in his home 35 to 40 feet from the machine (J.A. 14). Marcine Steele, a friend of appellees, testified that she had observed a cloud of moisture and heard noise (J.A. 15); that the air condensers are approximately one foot removed from the appellees' patio (J.A. 16); that the fountain attached to the wall of appellees cannot be heard when the air-conditioner of appellants is in operation (J.A. 16).

That the noise was sufficient to interfere with conversation and was a humming sound (J.A. 17). A landscape gardener, Mr. Harmon, was called as a witness for the appellees. He testified that in his opinion the roses along the fence separating the property of appellants and appellees were killed as a result of excessive moisture (J.A. 19). He observed this moisture on one occasion (J.A. 20). An engineer for the Washington Gas Light Company, who had installed this air-conditioning unit, testified that the machines did let out a spray (J.A. 25); that there are other locations in conformity with District of Columbia regulations on the property of appellants where the equipment could be placed (J.A. 26, 27). The appellant himself testified that he can hear this "purring noise" when he is outside of his house (J.A. 33); that the machines are located 10 to 15 feet from the edge of his house (J.A. 34, 35).

The Trial Court found from this evidence that the machines are a nuisance in their present location because of the noise and moisture. Appellants argue that the guide-line layed down in the case of *Akers v. Marsh*, 19 App. D.C. 28, was not followed in the present set of facts. The facts in this case briefly were that there was a suit by a husband and wife to enjoin certain parties from playing the game of croquet as late as 11:00 P.M. on a vacant lot next to complainants' dwelling. It was alleged that this action constituted a nuisance. The Court said: "A party must enjoy his own property in such manner as not to involve the legal rights of his neighbor as defined by law. But, in the relations of communities of people, mere matters of inconvenience or ordinary discomforts, such as are ordinarily incident to social life, must be endured, and cannot be made the subjects of judicial cognizance." (Page 42) "and no right of action either at law or in equity can be supported against a party for the reasonable use of his property or the reasonable exercise of his rights over the same, . . . (Page 42, 43). Hence a determination must be made by the Trial Court on the question of what is a "reasonable use of his property."

In *Akers v. Marsh, supra,* the Court did set down a standard, " . . . whether the nuisance complained of will, or does, produce such a condition of things as, in the judgment of reasonable men, is naturally productive of physical discomfort to persons of ordinary sensibilities, and of ordinary tastes and habits, and as, in view of the circumstances of the case, is unreasonable and in derogation of the rights of the complainant." (Page 45). Citing an earlier case, the Court sets out that in order to offend against the law, actions must be done in a manner which, beyond fair controversy, ought to be regarded as exceptional and unreasonable. (Page 47).

The evidence in the instant case meets the requirement that the machines do produce a condition of things as, in the judgment of reasonable men, is productive of physical discomfort to persons of ordinary sensibilities, tastes and habits. Certainly, the noise and moisture testified to herein should be regarded as exceptional and unreasonable.

The appellants cite in addition to the *Akers v. Marsh* case, *French v. The Association for Works of Mercy*, 39 App. D.C. 406. This was a case in which a party had sought an injunction against the operation and maintenance of a home for unfortunate girls. He complained of the noises created by the children and inmates. The Court held: "From our review of the evidence, we think it apparent that appellant really objects to the character of this institution, more than to the manner in which it is conducted. Indeed, he was asked in cross-examination whether he would object to the simple fact of the institution being there, object to the character of the institution, though the noises were not there, and answered, 'Most decidedly, Yes.'" The Court said that the text set out on page 45 of the *Akers* opinion should be applied and held that the evidence of the complainant showed that there were no noises save such as are usual and natural in homes where young people are assembled and where infants are gathered.

Again, by citing this case, appellant raises the question, does the evidence in the instant case constitute noises and moisture that are "usual and natural?" We do not believe so. We believe that the evidence has shown that both the noise and the moisture emanating from the air-conditioning machines are exceptional and unreasonable.

The appellants cite the case of *Heylman v. District of Columbia*, 27 App. D.C. 563. This case was decided on the question of the validity of a certain municipal regulation. However, in the course of the opinion of the Court, the Court did say at page 566, "All regulations looking to the protection of the rights of others in such cases must be reasonable, and the test of responsibility is that the prohibited use must be one naturally productive of material discomfort to persons of ordinary susceptibilities, tastes, and habits, and under ordinary circumstances, exceptions cannot be made to meet cases of pronounced idiosyncrasies and infirm health." There is no showing in the evidence in the present case that the complaints are made by and testified to by persons of infirm health or with pronounced idiosyncrasies. The evidence discloses that the air-conditioning machines are productive of material discomfort to persons of ordinary susceptibilities, tastes and habits and under ordinary circumstance.

The standard established in *Akers v. Marsh, supra,* has been met.

II

There Was Substantial Evidence To Show That This Was the Condition at the Time the Suit Was Filed and at the Time of Trial

The evidence showed that from the time of the installation of the machinery to the time of trial, the condition remained substantially the same (J.A. 5, 6, 10, 12, 13, 14, 15, 19 and 33). It is obvious from this testimony that the condition complained of exists whenever the air-conditioning unit was in operation. Naturally, it does not exist during the cold months.

The Court's judgment, based upon its finding, was that the air-conditioning condensers in their present location constitute a nuisance; that the appellants should move the said air-conditioning condensers from their present location and not install them in any location which will continue the nuisance complained of. In other words, the Court simply said to stop the operation of its machinery and its present location because in that location it would create a nuisance. The Court had found from the evidence that the noise and moisture was such as to constitute an unreasonable use of their property by the appellants. The enforcement of this order does not rest entirely on the sensitivities of the appellees. Witnesses who were neighbors and visitors to their home, had testified as to the condition created by the operation of the machines.

CONCLUSION

It is respectfully submitted that the decision of the Trial Court was correct and was supported by the evidence offered and should be affirmed.

Respectfully submitted,

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